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PSYCHOLOGICAL EVALUATIONS: THEIR USE AND MISUSE IN ILLINOIS CHILD ABUSE AND NEGLECT CASES

INTRODUCTION

Imagine that the Department of Children and Family Services (DCFS) takes custody of your children. They suspect you of child abuse, or neglect, or both. Your DCFS caseworker sends you to a psychologist for an evaluation. You talk with the psychologist, look at inkblots,¹ and take a 550 question test.² The results of this psychological evaluation partially determine whether DCFS recommends that your children be returned to your custody. The results of these tests might be admitted into evidence during various judicial proceedings. If DCFS recommends that the court terminate your parental rights, these results might be evidence at your trial.

In Illinois child custody determinations, psychological testimony plays an increasingly important role. Recent literature has focused on this type of testimony in the divorce context, however, less has been written about the use of this testimony in child abuse and neglect proceedings.³ This Comment discusses this important issue and provides a possible solution to the current problems. Part II discusses United States Supreme Court precedent and other important cases related to both the importance of the parent-child relationship and the admissibility of expert testimony.⁴ Part II then turns to Illinois law and explores its standard for expert testimony, details basic procedures employed in abuse and neglect cases, and examines guidelines for psychological testimony in child custody cases.⁵ Part III returns to the issue of expert testimony standards, explores the problems with mental health testimony in general, and then discusses how these problems affect specific cases.⁶ Part IV argues that the Supreme Court's elevation of the parent-child relationship mandates a higher standard for both the admissibility of expert testimony and its uses when the parent-child relationship is at stake. Part IV then argues

1. The Rorschach inkblot test is discussed *infra* notes 126–133 and accompanying text.

2. The Minnesota Multiphasic Personality Inventory (MMPI) is discussed *infra* notes 134–139 and accompanying text.

3. See, e.g., sources cited *infra* notes 56, 106, and 123.

4. See *infra* notes 8–55 and accompanying text.

5. See *infra* notes 56–102 and accompanying text.

6. See *infra* notes 103–253 and accompanying text.

that increasing attention must be paid to the two sets of guidelines that deal with this testimony.⁷ Finally, Part V concludes that Illinois must adopt the *Daubert* test in child abuse and neglect proceedings in order to prevent the admission into evidence of mental health testimony that does not meet the appropriate standards.

II. BACKGROUND

This section addresses the history of Supreme Court decisions in the following two areas: (1) Recognizing the importance of the parent-child relationship; and (2) determining the standards for the admissibility of expert testimony at the federal level. It then evaluates Illinois law and discusses Illinois's standard for the admissibility of expert testimony, the weight to be given such testimony in the context of *In re Ashley K*, and the treatment of the parent-child relationship in child abuse and neglect cases. This section then examines mental health testimony in general, two psychological tests commonly employed in child abuse and neglect cases, and guidelines for child custody evaluations.

A. *The Supreme Court and the Parent-Child Relationship*

The Supreme Court has strongly and repeatedly emphasized the importance of the parent-child relationship.⁸ It has noted that the family relationship is protected by the Ninth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.⁹ Supreme Court cases involving due process challenges have subsequently recognized the fundamental role of the parent-child relationship.

More than thirty years ago, the Supreme Court held that both due process and equal protection require courts to hold a hearing for all similarly situated parents before declaring their children wards of the

7. See *infra* notes 254-279 and accompanying text.

8. See, e.g., *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (stating that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944))).

9. *Stanley*, 405 U.S. at 651. The Court cites the following cases to support this proposition: *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (penumbral right of privacy extends to dispensing contraceptives and birth control information to married people); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (forced sterilization of persons convicted of two crimes involving moral turpitude violated equal protection because procreation is a "basic civil right of man"); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (holding that laws prohibiting the teaching of subjects in languages other than English below the eighth grade are unconstitutional. Such laws deprive both parents and teachers of liberty without due process of law because they bear no reasonable relation to a legitimate state purpose.).

state. In *Stanley v. Illinois*,¹⁰ the Supreme Court determined that Illinois courts could not deny an unmarried father a hearing on his fitness before declaring his child a ward of the state.¹¹ While noting that the state has an interest in removing children from the custody of neglectful parents, the Court concluded that no legitimate goal was served by separating "children from the custody of fit parents."¹² Therefore, Illinois could not presume that Stanley was unfit merely because it thought that most unmarried fathers were unfit.¹³ The Court held that due process required that Stanley receive a hearing. Further, the Court determined that giving a hearing only to some parents and not to others faced with the removal of their children violated the Equal Protection Clause of the Fourteenth Amendment.¹⁴

The Court has also recognized the importance of applying procedural safeguards in parental rights termination proceedings. The Court held that applying the preponderance of the evidence standard¹⁵ in parental rights termination proceedings violated the Due Process Clause of the Fourteenth Amendment.¹⁶ The Court further stated that a clear and convincing evidence standard¹⁷ passed constitutional muster, but allowed states to set their own burdens at that level or higher.¹⁸ The Court stated that

[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. . . . If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to de-

10. 405 U.S. 645 (1972). Stanley was not married to the mother of his three children; thus, when she died, they automatically became wards of the state pursuant to Illinois law. *Id.* at 646. Had Stanley wished to adopt the children, he would have been treated not as a parent, but as a stranger. *Id.* at 648.

11. *Id.* at 649.

12. *Id.* at 652.

13. *Id.* at 654.

14. *Stanley*, 405 U.S. at 649.

15. See MCCORMICK ON EVIDENCE § 340 (5th ed. 1999).

16. See generally *Santosky v. Kramer*, 455 U.S. 745 (1982). The Santoskys' case involved terminating parental rights to three of their children. *Id.* at 752 n.5. They also had two younger children who were in their custody. *Id.* The Court mentioned in a footnote that "[a]t oral argument, counsel for respondents replied affirmatively when asked whether he was asserting that petitioners were 'unfit to handle the three older ones but not unfit to handle the two younger ones.'" *Id.* at 752 n.5 (quoting Tr. of Oral Arg., at 24).

17. See MCCORMICK ON EVIDENCE, *supra* note 15, § 340.

18. *Santosky*, 455 U.S. at 770.

stroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.¹⁹

Disallowing the preponderance of the evidence standard ensured a higher level of protection for individuals faced with the prospect of losing their parental rights.²⁰ In a more recent case, *M.L.B. v. S.L.J.*,²¹ the Court again commented on the seriousness of terminating parental rights.²² The Court stated, "M.L.B.'s case, involving the State's authority to sever permanently a parent-child bond, demands the close consideration the Court has long required when a family association so undeniably important is at stake."²³ In holding that the state could not condition M.L.B.'s right to an appeal on her ability to pay, the Court stated, "[W]e place decrees forever terminating parental rights in the category of cases in which the State may not 'bolt the door to equal justice.'"²⁴ The Court viewed termination proceedings as "quasi-criminal"²⁵ and differentiated these cases "even from other domestic relations matters such as divorce, paternity, and child custody."²⁶

B. The Evolution of Federal Evidentiary Standards for Expert Testimony

In *Frye v. United States*,²⁷ the United States Court of Appeals for the District of Columbia developed a test for determining the admissibility of scientific evidence.²⁸ In affirming the lower court's holding

19. *Id.* at 753-54.

20. See also *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981). Although *Lassiter* held that the court need not appoint attorneys for all indigent defendants in proceedings to terminate parental rights, it reaffirmed the importance of the parent-child relationship: "This Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'" *Id.* at 27 (quoting *Stanley*, 405 U.S. at 651).

21. 519 U.S. 102 (1996).

22. *Id.* at 117. The plaintiff in *M.L.B.* sued the father of her two children. *Id.* at 107. The children had been in his custody as agreed to in the divorce. *Id.* The father had remarried, and the stepmother wanted to adopt the children. *Id.* The father and stepmother claimed that M.L.B. had been remiss in both visitation and child support payments; M.L.B. contended that the father did not allow her reasonable visitation. *Id.*

23. *M.L.B.*, 519 U.S. at 117.

24. *Id.* at 124 (quoting *Griffin v. Illinois*, 351 U.S. 12, 24 (1956) (holding that states that grant appellate review cannot discriminate between wealthy and indigent defendants)).

25. *Id.* For another case involving "quasi-criminal overtones," see *Little v. Sreater*, 452 U.S. 1, 9 (1981) (holding that paternity determinations are quasi-criminal and that an indigent defendant could not be denied a "blood grouping test" because of his inability to pay).

26. *M.L.B.*, 519 U.S. at 127.

27. 293 F. 1013 (D.C. Cir. 1923).

28. See generally *id.*

that results of a systolic blood pressure-based lie detector test were inadmissible, the court articulated what would become known as the *Frye* general acceptance test.²⁹ The court noted that “while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.”³⁰ Lie detector tests did not meet the general acceptance requirement. This general acceptance test became widely used by all federal circuits and many states, which adopted it based on their own rules of evidence.³¹ Sixteen states still expressly apply the *Frye* standard or a variation thereof, including Illinois.³²

A different approach to the admissibility of expert testimony was introduced in *Barefoot v. Estelle*.³³ In *Barefoot*,³⁴ the Court held that evidence, including expert testimony, should generally be admitted when relevant: “[T]he rules of evidence generally extant at the federal and state levels anticipate that relevant, unprivileged evidence should be admitted and its weight left to the factfinder, who would have the benefit of cross-examination and contrary evidence by the opposing party.”³⁵ Under the *Barefoot* principle, juries, not judges, performed most of the analysis regarding the merits of such testimony.³⁶

29. *Id.* at 1014. The defendant wished to offer testimony from a scientist who conducted the lie detector test; the government objected. *Id.*

30. *Id.*

31. See Andrew F. Stolfi, Note, *Why Illinois Should Abandon Frye's General Acceptance Standard for the Admission of Novel Scientific Evidence*, 78 CHI.-KENT L. REV. 861, 862 (2003).

32. For a detailed discussion of evidentiary standards in state courts, see Alice B. Lustre, Annotation, *Post-Daubert Standards for Admissibility of Scientific and Other Expert Evidence in State Courts*, 90 A.L.R. 5th 453 (2001). See generally Stolfi, *supra* note 31. Stolfi suggests that fourteen states still use *Frye* and three additional states have modified it. *Id.* at 862.

33. 463 U.S. 880 (1983).

34. In *Barefoot*, a death penalty case, two psychiatrists who had not examined the defendant testified in response to hypothetical questions. *Id.* at 885. Each answered that the defendant would most likely commit future violent acts and remain a threat to society. *Id.* The American Psychiatric Association filed an amicus brief against the use of this future dangerousness testimony. *Id.* at 898. The Court said that flaws with this testimony are properly the subjects of cross-examination:

Psychiatric testimony predicting dangerousness may be countered not only as erroneous in a particular case but also as generally so unreliable that it should be ignored. If the jury may make up its mind about future dangerousness unaided by psychiatric testimony, jurors should not be barred from hearing the views of the State's psychiatrists along with opposing views of the defendant's doctors.

Id. at 898–99. For a detailed discussion of *Barefoot* and its implications, see Daniel W. Shuman & Bruce D. Sales, *The Admissibility of Expert Testimony Based Upon Clinical Judgment and Scientific Research*, 4 PSYCHOL. PUB. POL'Y & L. 1226, 1237 (1998).

35. *Barefoot*, 463 U.S. at 898.

36. See generally *id.*

Ten years later, in a radical departure from the *Barefoot* reasoning, the Supreme Court gave the judge a vastly increased role—that of gatekeeper.³⁷ Without ever mentioning *Barefoot*,³⁸ the Court in *Daubert v. Merrill Dow Pharmaceuticals* decided whether *Frye* was still good law in light of the recently amended Federal Rules of Evidence. In *Daubert*,³⁹ the Supreme Court definitively held that Federal Rule of Evidence 702⁴⁰ superseded the *Frye* general acceptance test.⁴¹ The Court went on to discuss its new standard: “Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a),⁴² whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact

37. See generally *Daubert*, 509 U.S. 579.

38. For a detailed discussion of *Barefoot* and its relationship to *Daubert*, see Michael H. Gottesman, *From Barefoot to Daubert to Joiner: Triple Play or Double Error?*, 40 ARIZ. L. REV. 753, 754–68 (1998). Gottesman discusses the changes that occurred in the ten years between *Barefoot* and *Daubert*. *Id.* at 756–57. Although not mentioned in the Court’s opinion, he thinks that mistrust of experts-for-hire led to a dramatic departure from the *Barefoot* reasoning. *Id.*

39. *Daubert*, 509 U.S. 579. *Daubert* involved a suit brought by parents who claimed that their child had suffered birth defects due to the mother’s use of the prescription anti-nausea drug, Bendectin. *Id.* at 582. The drug company moved for summary judgment and submitted an affidavit from an epidemiologist stating that no published study had ever shown Bendectin to cause birth defects. *Id.* The petitioners produced eight experts who claimed that the Bendectin caused birth defects. *Id.* at 583. The experts based their conclusions

upon “in vitro” (test tube) and “in vivo” (live) animal studies that found a link between Bendectin and malformations; pharmacological studies of the chemical structure of Bendectin that purported to show similarities between the structure of the drug and that of other substances known to cause birth defects; and the “reanalysis” of previously published epidemiological (human statistical) studies.

Id. Summary judgment was granted in favor of the drug company because the district court thought that the methodology of the eight experts had not gained general acceptance and therefore failed the *Frye* test. *Id.* After announcing the *Daubert* test, the Supreme Court remanded the case to the lower court. *Daubert*, 509 U.S. at 598.

40. FED. R. EVID. 702. “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” *Id.* Rule 702 was amended in 2000 in order to include reference to *Daubert*-type principles. Rule 702 now includes additional language stating that scientific testimony will be allowed “if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.” *Id.*

41. *Daubert*, 509 U.S. at 587.

42. The Court stated that

“[p]reliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b) [pertaining to conditional admissions]. In making its determination it is not bound by the rules of evidence except those with respect to privileges.” These matters should be established by a preponderance of proof.

Id. at 592 n.10 (quoting FED. R. EVID. 104(a)).

to understand or determine a fact in issue.”⁴³ After answering that threshold question, the trial court should consider the following four factors to determine whether scientific evidence is admissible: (1) Whether the methodology has or can be tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential error rate; and (4) whether the theory or methodology has obtained general acceptance in the scientific community.⁴⁴ These criteria do not have to be met individually. Instead, the trial court should look to them collectively before rendering its decision; the “overarching subject is scientific validity.”⁴⁵ *Daubert* now governs federal proceedings and the proceedings of those states that have adopted the federal rules, yet *Frye* remains good law in other states.⁴⁶

In subsequent decisions, the Supreme Court clarified the proper interpretation of *Daubert*. First, in *General Electric Co. v. Joiner*,⁴⁷ the Supreme Court held that a trial court’s ruling on whether to exclude expert testimony under *Daubert* should be reviewed under the abuse of discretion standard.⁴⁸ Many circuit courts had been using a stricter standard; *Joiner* ended the controversy.⁴⁹ However, the Court also cautioned judges against taking their “gatekeeping” function lightly: “[N]either the difficulty of the task nor any comparative lack of expertise can excuse the judge from exercising the ‘gatekeeper’ duties that the Federal Rules of Evidence impose To the contrary, when law and science intersect, those duties often must be exercised with special care.”⁵⁰ Second, in *Kumho Tire Co. v. Carmichael*,⁵¹ the Court held that the *Daubert* standard applied to all expert testimony, scientific or

43. *Id.* at 592.

44. *Id.*

45. *Id.* at 594.

46. See generally Lustre, *supra* note 32.

47. 522 U.S. 136 (1997). Joiner worked as an electrician and often dealt with a fluid that was later found to contain polychlorinated biphenyl (PCB). *Id.* at 139. Joiner developed lung cancer and sued his company, alleging that PCB exposure caused his cancer. *Id.* The district court granted summary judgment against Joiner because “the testimony of Joiner’s experts had failed to show that there was a link between exposure to PCB’s [sic] and small-cell lung cancer.” *Id.* at 140. The district court did not admit testimony by Joiner’s experts because it thought that the testimony was not sufficiently reliable. *Id.* The appellate court reversed, stating that the testimony should have been admissible; its reliability was a matter for the jury. *Id.* at 141. The Supreme Court reversed the appellate court’s decision, holding that the district court did not abuse its discretion by excluding the testimony. *Joiner*, 522 U.S. at 146–47.

48. *Id.* at 141.

49. Gerson H. Smoger, *From Rule 702 to Daubert to Joiner to Kumho Tire: A Review of the Supreme Court’s Analysis of the Admissibility of Expert Testimony*, ATLA-CLE, Winter 2001, at 467.

50. *Joiner*, 522 U.S. at 148.

51. 526 U.S. 137 (1999).

not.⁵² Because no clear lines exist between scientific knowledge and other specialized knowledge, to hold otherwise makes it practically impossible for judges to exercise their “gatekeeping” function.⁵³ *Kumho Tire* expanded the judge’s gatekeeper role and gave the judge increased control over expert witnesses.⁵⁴ It also provided litigators with more leverage to challenge the credibility of the expert testimony.⁵⁵

C. *Illinois: Expert Testimony Standards and Their Implications for Child Abuse and Neglect Cases*

This section first discusses the Illinois standard for general expert testimony. Second, it discusses Illinois’s treatment of the parent-child relationship under the Juvenile Court Act. Third, this section examines the standards for expert testimony specific to child abuse and neglect cases. Finally, it examines uses of psychological evaluations.

1. *Expert Testimony Standards in Illinois*

Illinois continues to be viewed as a *Frye* state; however, the law is somewhat ambiguous.⁵⁶ The first Illinois Supreme Court case mentioning *Frye* was *People v. Baynes* in 1981.⁵⁷ Most Illinois courts continued to apply the *Frye* standard, and attempts to modify it were quickly rejected.⁵⁸

52. *Id.* at 141.

53. *Id.* at 148 (referencing *Daubert*). For a discussion of the implications of *Kumho Tire* and other standards for determining the admissibility of expert testimony based other than on hard science, see Emily J. Baggett, *The Standards Applied to the Admission of Soft Science Experts in State Courts*, 26 AM. J. TRIAL ADVOC. 149 (2002), and Leslie Morsek, *Get on Board for the Ride of Your Life! The Ups, the Downs, the Twists, and the Turns of the Applicability of the “Gatekeeper” Function to Scientific and Non-Scientific Expert Evidence: Kumho’s Expansion of Daubert*, 34 AKRON L. REV. 689 (2001). The *Kumho Tire* plaintiffs brought suit against a tire manufacturer, alleging that a defective tire caused injuries and death. *Kumho Tire*, 526 U.S. at 142. An engineer testified that the tire was defective and used the analysis of tire treads and other technical concepts to make his argument. *Id.* The trial court excluded his testimony because it did not think it met the Rule 702 admissibility standard. *Id.* at 145. The appellate court reversed, stating that it was inappropriate to use *Daubert*-type analysis when the proffered testimony is technical, not scientific. *Id.* at 146. The Supreme Court reversed, stating that the district court reasonably found the engineer’s methodology insufficiently reliable and did not abuse its discretion by excluding it. *Id.* at 158.

54. See generally *Kumho Tire*, 526 U.S. 137.

55. Morsek, *supra* note 53, at 734–38.

56. See Thomas A. Gionis & Anthony S. Zito, Jr., *A Call for the Adoption of Federal Rule of Evidence 702 for the Admissibility of Mental-Health Professional Expert Testimony in Illinois Child-Custody Cases*, 27 S. ILL. U. L.J. 1, 14 (2002).

57. *People v. Baynes*, 430 N.E.2d 1070 (1981), cited in William A. Schroeder, *The Future of Frye in Illinois*, 82 ILL. B.J. 488–89 (1994).

58. See *infra* notes 59–64 and accompanying text.

For example, in *Harris v. Cropmate*, an Illinois appellate court articulated a “*Frye* plus reliability” standard for the admission of novel scientific evidence.⁵⁹ This standard recommended that a trial court undertake six inquiries into the adequacy of the scientific evidence.⁶⁰ Four inquiries dealt with the nature of the evidence being offered and the fifth asked whether the evidence met the *Frye* admissibility standard.⁶¹ The sixth and final inquiry looked to reliability, for which the trial court could examine six factors, including the *Daubert* factors.⁶² But the Illinois Supreme Court soon rejected this standard and, in *Donaldson v. Central Illinois Public Service Co.*,⁶³ “emphatically declared that ‘Illinois law is unequivocal: [T]he exclusive test for the admission of expert testimony is governed by the standard first expressed in *Frye v. United States*.’”⁶⁴

2. *The Best Interests of the Child Standard and the Juvenile Court Act*⁶⁵

In making custody determinations, Illinois uses the best interests of the child standard: “Upon a petition for restoration of a minor to the custody of the parents the issue that singly must be decided is the best interest of the child.”⁶⁶ Despite the importance of the parent-child

59. *Harris v. Cropmate*, 706 N.E.2d 55, 60 (Ill. App. Ct. 1999); see also Stolfi, *supra* note 32, at 884.

60. See Stolfi, *supra* note 32, at 884 (citing *Harris*, 706 N.E.2d at 59–65).

61. *Harris*, 706 N.E.2d at 60–64. The first four inquiries are: (1) “Precisely what evidence is being proffered?” *Id.* at 60. (2) “Will the proffered testimony assist the trier of fact to understand the evidence or determine facts in issue, or can the trier of fact use its own knowledge and experience?” *Id.* (3) “[D]oes the proffered testimony constitute ‘scientific’ evidence?” *Id.* (4) “[I]s that scientific evidence ‘novel’?” *Id.* at 62.

62. *Id.* at 64–65.

63. 767 N.E.2d 314 (Ill. 2002).

64. Stolfi, *supra* note 32, at 886 (quoting *Donaldson*, 767 N.E.2d at 323).

65. The Illinois Juvenile Court Act of 1987, 705 ILL. COMP. STAT. 405/1-1–7-1 (2003), describes in detail the various stages of and requirements for child abuse and neglect proceedings. After the Department of Children and Family Services (DCFS) is granted guardianship in a case, the major stages are: disposition, adjudication, first permanency hearing, and subsequent permanency hearings every six months. See 705 ILL. COMP. STAT. 405/2-1–2-33.

66. *In re Ashley K.*, 571 N.E.2d 905, 923 (Ill. App. Ct. 1991). For a discussion of potential ramifications of *Ashley K.*, see H. Joseph Gitlin, *Defining the Best Interest of Children: Parents v. Others in Custody Proceedings*, 79 ILL. B.J. 566 (1991). Gitlin also discusses the standards that existed prior to the best interests of the child standard. *Id.* For example, the tender years doctrine gave strong support to the idea that every child needs his or her mother during his or her formative years. *Id.* at 566–67. This doctrine is explained in *Nye v. Nye*, 105 N.E.2d 300, 303 (1952): “The maternal affection is more active and better adapted to the care of the child. Especially is this true in the case of a minor daughter, where the care and guidance of a mother’s hand is doubly important.” Gitlin, *supra*, at 567 (citing *Nye*, 105 N.E.2d at 303). Gitlin’s article discusses the evolution of the best interests of the child standard, the superior parental rights doctrine, and other relevant topics. See generally *id.* For another discussion of the tender years

relationship, "The best interest of the child takes precedence over even a natural parent's superior right to custody of his child."⁶⁷ The Illinois Juvenile Court Act clearly states: "The parents' right to the custody⁶⁸ of their child shall not prevail when the court determines that it is contrary to the health, safety, and best interests of the child."⁶⁹

3. *Deference to Medical Testimony*

In the *In re Ashley K* case, an Illinois appellate court described the expected weight to be given to expert testimony in child abuse and neglect cases.⁷⁰ In addition to the specific holding regarding Ashley, the court articulated a new policy concerning expert testimony:⁷¹

Expert medical testimony and medical evidence are by their nature too recondite to be refuted by non-medical testimony. . . . The circuit court cannot disregard expert medical testimony that is not countervailed by other competent medical testimony or medical evidence. Moreover, the circuit court, itself, cannot second-guess medical experts. If the circuit court does not follow medical evidence that is not refuted by other medical evidence, the circuit court is acting contrary to the evidence.⁷²

The *Ashley K*⁷³ opinion is also important because it reemphasized that parents' rights to care for and retain custody of their child do not

doctrine, see MELVIN G. GOLDBLAND, CUSTODY CASES AND EXPERT WITNESSES: A MANUAL FOR ATTORNEYS 17 (1988).

67. *In re Violetta B.*, 568 N.E.2d 1345, 1352 (Ill. App. Ct. 2001).

68. For a concise discussion that cites key decisions regarding the parental right to custody in Illinois, see HORNER PROBATE PRAC. & ESTATES § 886 (2003).

69. 705 ILL. COMP. STAT. 405/1-2(3)(c) (2003).

70. See generally *Ashley K*, 571 N.E.2d 905. Illinois is not the only state to afford great deference to mental health testimony in abuse and neglect cases. California cases in particular are replete with mentions of psychological testing and evaluations. See, e.g., *Jesse B. v. Super. Ct.*, No. H024925, 2002 WL 31781134 (Cal. Ct. App. 2002); *Laurie S. v. Super. Ct.*, 31 Cal. Rptr. 2d 506 (Ct. App. 1994).

71. See generally *Ashley K*, 571 N.E.2d 905.

72. *Id.* at 930.

73. *Id.* at 906. *Ashley K* involved an appeal from a circuit court order that prohibited Ashley from receiving therapy and also prohibited visitation between Ashley and her former foster parents with whom she had lived for over five years before returning to her birth parents. *Id.* Ashley was originally placed with a foster family because she was born addicted to heroin, her mother prostituted herself to maintain her drug habit, and Ashley's siblings had open cases with DCFS due to unsafe living conditions. *Id.* During the next few years, Ashley's parents continued to use drugs, had trouble with the law, and visited Ashley sporadically. *Id.* at 908. When Ashley turned three, things began to change. *Ashley K*, 571 N.E.2d at 908. The mother enrolled in drug treatment programs and visitation increased; however, Ashley's behavior deteriorated. *Id.* at 1210. A hospital evaluated Ashley and recommended that she remain with her foster parents and move toward adoption. *Id.* at 1210. In contrast, DCFS continued to recommend that Ashley return home. See generally *id.*

take precedence over the best interests of the child standard as outlined in the Juvenile Court Act.⁷⁴

At least one Illinois appellate court attempted to limit the scope of the *Ashley K* decision. In the case *In re C.B.*,⁷⁵ Dorothy Petty, the maternal grandmother of C.B., appealed from a judgment granting permanent guardianship to a non-relative, Tonya Wood.⁷⁶ Because of the custody dispute, DCFS requested psychiatrists to conduct a psychiatric evaluation of the involved parties prior to determining permanent custody.⁷⁷ A child psychiatrist with thirty years of experience, Dr. J. Hirsch, performed the evaluation along with an assistant, Dr. Defne Dursunkaya, who had completed four years of residency.⁷⁸ The evaluation consisted of observing Wood and C.B. together for two one-hour sessions, and Petty and C.B. together for one one-hour session.⁷⁹ At the first session, the therapist mainly gathered background information.⁸⁰ At the second, the assistant performed further

Other evaluations were conducted, and at a hearing in 1989, two psychiatrists testified against returning Ashley home to her parents. *Id.* at 912. Dr. L. David Sinn, who was board certified in psychiatry, testified: "I believe it is in her best interest to remain in the Procopios' home." *Id.* He explained his reasons at length and included the comments: "It has been my experience working with older children and young adults who have had this happen to them that it continues to haunt them. They have difficulty making a relationship because of the fear that it will always be taken away." *Ashley K*, 571 N.E.2d at 912. A second expert, Paul Fitzgerald, who had been treating Ashley for more than six months at Community Family Services, agreed with this recommendation. *Id.*

DCFS then asked Anne M. Brown, Ph.D., a psychologist, to interview all parties and to prepare a report for the court. *Id.* at 913. Brown recommended that Hephzibah Children's Association, a child welfare agency, assess the situation and then recommend whether the child should remain in foster care or return to the natural parents. *Id.* at 912. The court noted with disapproval that DCFS acted on this recommendation rather than that of Dr. Zinn. *Id.* It also noted that Ashley was happy with her foster family, yet despite this, DCFS and Hephzibah recommended that Ashley be transferred to their shelter as an intermediate step. *Id.* at 914. Ashley eventually returned home. *Ashley K*, 571 N.E.2d at 915.

74. Gitlin, *supra* note 66, at 570.

75. 618 N.E.2d 598 (Ill. App. Ct. 1993).

76. *Id.* Prior to the formal guardianship decision, C.B. had lived with his mother and Petty together, then later with Wood and the mother. *Id.* at 599. The mother eventually left C.B. with Wood and moved away from Illinois. *Id.* at 600. During this time period, C.B. spent weekends with Petty, and Petty financially supported the child to some degree. *Id.* The relationship between C.B. and Wood, initially informal, changed when Wood realized that the mother was not going to return. *Id.* Petty informed DCFS-affiliated personnel of the situation and expressed her intention to adopt C.B. and C.B.'s two siblings. *In re C.B.*, 618 N.E.2d at 600. At a wardship hearing, of which Petty was unaware, the court granted Wood temporary private guardianship. *Id.* Once Petty became aware of the situation, she petitioned to vacate the private guardianship order. *Id.*

77. *Id.* at 601.

78. *Id.*

79. *Id.*

80. *In re C.B.*, 618 N.E.2d at 601.

observations and obtained more background information.⁸¹ A written report, according to the court, "conclude[d], in a single paragraph, that C.B. was 'clearly attached' to Wood, his primary caretaker, and that disruption of this bonding at the 'current sensitive period' of C.B.'s psychological development would be detrimental."⁸²

When questioned by the court, both doctors said that additional observations would not have changed their opinions because of the "theory and belief that the psychological development of a child can be permanently impaired or damaged if that child is removed from his primary caregiver during the critical developmental period between the ages of 6 months and four years."⁸³ The trial court accepted this decision and the reasoning behind it because it thought that *Ashley K* required it to accept uncontradicted expert testimony.⁸⁴ The appellate court reversed, stating, "In the present case there was no competent medical evidence to indicate that C.B. would be at risk if custody was transferred to his grandmother. Drs. Hirsch and Dursunkaya merely applied the theory of psychological parenting in the abstract, without any basis in fact for doing so."⁸⁵ The appellate court's decision articulated the principle that while competent medical testimony based on the facts of an individual case may not be disregarded, broad psychological principles not adequately keyed to specific circumstances can be challenged.⁸⁶

4. *Current Practice in Cook County: Psychological Evaluations and Testimony*

Psychological evaluations can be used during many stages of child abuse and neglect proceedings.⁸⁷ They may be ordered prior to determining whether supervised or unsupervised visits should occur, and if such visitations should occur, how they should be supervised.⁸⁸ They also play into the ultimate determinations, such as permanency goals.⁸⁹ The evaluations are typically performed by an agency that has

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 605.

86. Gionis and Zito, *supra* note 56, argue that adopting Rule 702 would force judges to make sure that expert testimony and evidence is not only "reliable, [but also] sufficiently tied to the facts of a particular case, and properly applied." *Id.* at 62. "That should greatly inure to the true best interest of a child involved in a custody dispute." *Id.* at 70.

87. Interview with Sheryl Buske, Legal Writing Instructor, DePaul University College of Law, former Department of Children and Family Services counsel in Chicago, Illinois (Nov. 1, 2003).

88. *Id.*

89. *Id.* See 705 ILL. COMP. STAT. 405/2-28 (2001).

a contract with DCFS.⁹⁰ The completed evaluation is part of the court file and can be viewed by the other parent, attorneys, and other interested parties.⁹¹

D. Guidelines for Child Custody Evaluations

Guidelines developed by the American Psychological Association (APA)⁹² and the Association of Family Conciliation Courts (AFCC)⁹³ provide standards for evaluators engaged in child protection and child custody disputes. These comprehensive guidelines discuss how to avoid many of the common pitfalls associated with the use of psychological testimony.

The APA's guidelines⁹⁴ discuss different challenges evaluators face and how best to respond to those challenges. For example, one guideline discusses the proper role of the evaluator:

In performing protection evaluations, psychologists do not act as judges, who make the ultimate decision by applying the law to all relevant evidence, or as advocating attorneys for any particular party. Whether retained by the court, the child protection agency, the parent(s) or the guardian *ad litem* for the child, psychologists should strive to be objective. Psychologists rely on scientifically and professionally derived knowledge when making judgments and describe fairly the bases for their testimonies and conclusions.⁹⁵

90. Interview with Sheryl Buske, Legal Writing Instructor, DePaul University College of Law, former Department of Children and Family Services counsel in Chicago, Illinois (Nov. 1, 2003).

91. This practice violates the confidentiality rules traditionally associated with the relationship between mental health professionals and their clients.

92. American Psychological Association, *Guidelines for Psychological Evaluations in Child Protection Matters*, available at <http://www.apa.org/practice/childprotection.html> (last visited Feb. 1, 2005) [hereinafter APA].

93. Association of Family Conciliation Courts, *Model Standards of Practice for Child Custody Evaluations*, available at http://www.afccnet.org/pdfs/Child_Model_Standards.pdf (last visited Feb. 1, 2005) [hereinafter AFCC].

94. APA, *supra* note 92.

95. *Id.* at Guideline 4.

These guidelines also caution against bias⁹⁶ and overinterpreting clinical or assessment data,⁹⁷ and recommend that the psychologist performing such evaluations gain specialized competence.⁹⁸ Both sets of guidelines urge evaluators to use multiple methods of data collection.⁹⁹

One of the APA guidelines stresses that certain procedures must be employed when giving the evaluations to the courts:

Psychologists refrain from drawing conclusions not adequately supported by the data. Psychologists interpret any data from interviews or tests cautiously and conservatively, strive to be knowledgeable about cultural norms and present findings in a form understandable to the recipient. Psychologists strive to acknowledge to the court any limitations in methods or data used. In addition, psychologists are aware that in compelled evaluations the situation may lend itself to defensiveness by the participant, given the potentially serious consequences of an adverse finding. Consequently, the situational determinants should be borne in mind when interpreting test findings.¹⁰⁰

The AFCC guidelines discuss psychological testing and suggest that whatever test is used, the primary concern of the overall evaluation process should be parenting capacity.¹⁰¹ If psychological test results

96. Guideline 7 states:

Psychologists engaging in psychological evaluations in child protection matters are aware of how biases regarding age, gender, race, ethnicity, national origin, religion, sexual orientation, disability, language, culture and socioeconomic status may interfere with an objective evaluation and recommendations. Psychologists recognize and strive to overcome any such biases or withdraw from the evaluation. When interpreting evaluation results, psychologists strive to be aware that there are diverse cultural and community methods of child rearing, and consider these in the context of the existing state and Federal[sic] laws. Also, psychologists should use, whenever available, tests and norms based on populations similar to those evaluated.

Id. (footnote omitted).

97. *Id.*

98. APA Guideline 6 states: "Competence in performing psychological assessments of children, adults and families is necessary but not sufficient." APA, *supra* note 92, at Guideline 6. The guidelines recommend education, training, experience and/or supervision in forensic practice, child and family development, child and family psychopathology, the impact of separation on the child, the nature of various types of child abuse and the roles of human differences, applicable legal standards and procedure, and scientific and clinical standards for data collection. *Id.*

99. AFCC, *supra* note 93, states: "In general, as diverse a number of procedures for data collection as possible and feasible to the specific evaluation is encouraged. These may include interviewing, observation, testing, use of collaterals, and home visits." *Id.* pt. III. Similarly, the APA's guidelines urge multiple methods of data gathering: clinical interviews, observation and psychological testing, reviewing relevant reports, and observing the parent-child interaction when not prohibited by the court or safety concerns. APA, *supra* note 92.

100. *Id.* at Guideline 13.

101. AFCC, *supra* note 93.

form a significant portion of the final report, the limitations of such testing should be included with the report.¹⁰²

III. ANALYSIS

This section revisits *Frye* and *Daubert*, and discusses the strengths and weaknesses of each. It then discusses problems with mental health testimony generally and analyzes five Illinois child abuse and neglect cases involving testimony or reports by mental health professionals.

A. *Frye and Daubert Revisited*

Proponents of *Frye* argue that its use of only one factor, general acceptance,¹⁰³ increases the "likelihood of uniform rulings."¹⁰⁴ Furthermore, the proponents commend *Frye*'s use of the qualified opinions from the relevant scientific community in order to assist the trial judge with admissibility decisions.¹⁰⁵ *Frye*'s opponents argue, however, that general acceptance does not necessarily guarantee reliability.¹⁰⁶

In contrast, *Daubert*'s critics argue that it is based on a flawed assumption "that trial judges, as gatekeepers, can effectively and competently apply their level of scientific knowledge to determine the reliability of all sciences, currently known to mankind, as well or conceivably *better* than each individual well-credentialed scientist who proffers their evidence."¹⁰⁷ Such critics argue that the relevant scien-

102. *Id.* For examples of well-crafted custody evaluations, albeit in the divorce context, see PHILIP MICHAEL STAHL, CONDUCTING CHILD CUSTODY EVALUATIONS: A COMPREHENSIVE GUIDE 217 (1994).

103. See *supra* notes 27–32 and accompanying text.

104. William A. Schroeder, *The Future of Frye in Illinois*, 82 ILL. B.J. 488, 490 (1994).

105. For an interesting discussion of how the differences between *Frye* and *Daubert* play out in the criminal context, see Christopher Slobogin, *The Admissibility of Behavioral Science Information in Criminal Trials from Primitivism to Daubert to Voice*, 5 PSYCHOL. PUB. POL'Y & L. 100 (1999).

106. See Laura Callahan, Comment, *Controversial Scientific Evidence: When the Victim Is a Child, Shouldn't We Daubert Rather Than Frye?*, 24 WHITTIER L. REV. 1019 (2003); see also Daniel W. Shuman, *What Should We Permit Mental Health Professionals to Say About "The Best Interests of the Child?" An Essay on Common Sense, Daubert, and the Rules of Evidence*, 31 FAM. L.Q. 551, 556 (1997). Shuman suggests three ways in which *Daubert* improves upon *Frye*: (1) by attempting to define "science;" (2) by making judges, not scientists, responsible for policing admissibility; and (3) by providing a way to analyze admissibility that is more than "mere popularity." *Id.*

107. Craig Lee Montz, *Trial Judges as Scientific Gatekeepers After Daubert*, Joiner, Kumho Tire, and Amended Rule 702: Is Anyone Still Seriously Buying This?, 33 UWLA L. REV. 87, 106 (2001); see also Paul S. Milich, *Controversial Science in the Courtroom: Daubert and the Law's Hubris*, 43 EMORY L.J. 913, 919 (1994); Daniel W. Shuman, *The Impact of Daubert and Its Progeny on the Admissibility of Behavioral and Social Science Evidence*, 5 PSYCHOL. PUB. POL'Y

tific community is more qualified than the judiciary to make such judgments.¹⁰⁸

B. *Psychological Evaluations: Potential Pitfalls*

This section discusses three potential problems with mental health testimony. First, the observations of mental health professionals, while often considered highly reliable, can also be seriously flawed. Second, when such testimony is made in the context of child abuse and neglect cases, concerns about bias related to class, race, and gender arise. Third, psychological tests often are interpreted by courts to provide information beyond their proper scope. Consequently, the judicial deference afforded to mental health professionals cannot be justified.

1. *Problems with the Observations of Mental Health Professionals Generally*

Psychologists and psychiatrists often make judgments that are based on only a fraction of the available data, which can seriously affect their ultimate judgments.¹⁰⁹ Clinicians tend to form a hypothesis and then seek information that confirms it, while not using contrary information.¹¹⁰

For example, "[i]f the situation is one associated with pathology (e.g., the client is admitting distress), counselors are prone to search for information indicative of pathology and then interpret this information as indicative of more pathology than may exist."¹¹¹ Since psychological evaluations are usually ordered when a judge, caseworker, or attorney exhibits concern about a parent's mental health, the situation becomes "one associated with pathology."¹¹² Consequently, overpathologizing the parent is a real danger.

This general tendency towards hypothesis confirmation increases when socioeconomic indicators are known: "Clinicians tend to view

& L. 3 (1999). Shuman discusses the problem of judges' insufficient expertise to evaluate mental health and other types of social science testimony, but views *Daubert* as providing a charge to behavioral scientists: It invites them to critically examine their own judgments to see if those judgments exceed their area of scientifically based expertise. *Id.* Shuman has an optimistic outlook as to *Daubert*'s eventual impact: "Perhaps this is one area where the law may ultimately lead the way in improving professional and scientific practices." *Id.* at 14.

108. See generally Shuman, *supra* note 107.

109. Terrence J. Tracey & James Rounds, *Inference and Attribution Errors in Test Interpretation*, in SCIENTIST-PRACTITIONER PERSPECTIVES ON TEST INTERPRETATION 113, 121-22 (James W. Lichtenberg & Rodney K. Goodyear eds., 1999).

110. *Id.* at 114-15.

111. *Id.* at 116.

112. *Id.*

the poor, members of lower social classes, people of color, and females as having greater pathology."¹¹³ Since the vast majority of individuals involved with child protection services fall into one of these categories, the dangers are especially grave.¹¹⁴

Because clinicians may focus only on confirmatory information, they inaccurately find confidence in their decisions.¹¹⁵ Research has shown that clinicians, like laypersons, exaggerate confidence in their knowledge.¹¹⁶ Thus, when clinicians testify or submit a report, they might assert more confidence in their conclusions than is scientifically warranted.¹¹⁷

The judgments of clinicians in clinical settings can certainly be questioned.¹¹⁸ Literature on the topic reveals that "expert judgments that are clinically derived, as opposed to actuarially derived,¹¹⁹ are as susceptible to error as lay judgments, and that clinical decision makers, like untrained lay decision makers, use strategies (or heuristics) in arriving at decisions that contribute to the error rate."¹²⁰ Two commentators suggest that if a psychiatrist has a preconceived outcome in mind, he or she can manipulate the data so that it points to the desired conclusion.¹²¹ This may be accomplished by "taking only a selective history, or by selectively examining the subject's mental state, or by failing to order needed tests."¹²²

113. *Id.*

114. See generally Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System: An Essay*, 48 S.C. L. REV. 577 (1997). For a discussion of the additional hurdles poor parents face in the child welfare system, see Kathleen A. Bailie, *The Other "Neglected" Parties in Child Protective Proceedings: Parents in Poverty and the Role of the Lawyers Who Represent Them*, 66 FORDHAM L. REV. 2285 (1998). Professor Bailie argues that because of these barriers, lawyers who represent the parents should have specialized training in the field, including aspects of social work and psychology that are relevant to abuse and neglect proceedings. *Id.* at 2324.

115. Tracey & Rounds, *supra* note 109.

116. SCOTT T. MEIER, *THE CHRONIC CRISIS IN PSYCHOLOGICAL MEASUREMENT AND ASSESSMENT: A HISTORICAL SURVEY* (1994).

117. *Id.*

118. See Gionis & Zito, *supra* note 56. These commentators suggest that three "common errors include: (1) an overestimation of the clinician's knowledge about a decision; (2) attributing causality on the basis of the clinician's own subjective framing of the information; and (3) making stereotypical decisions by reviewing and selecting data to support preconceived conclusions." *Id.* at 13.

119. For a discussion of clinical versus actuarial predictions, see William M. Grove & Paul E. Meehl, *Comparative Efficiency of Informal (Subjective, Impressionistic) and Formal (Mechanical, Algorithmic) Prediction Procedures: The Clinical-Statistical Controversy*, 2 PSYCHOL. PUB. POL'Y & L. 293 (1996).

120. See Shuman & Sales, *supra* note 34, at 1228.

121. Ansar M. Haroun & Grant H. Morris, *Weaving a Tangled Web: The Deceptions of Psychiatrists*, 10 J. CONTEMP. LEGAL ISSUES 227, 235 (1999).

122. *Id.*

2. *Psychological Testing*

When psychological tests are based on objective measures instead of subjective impressions they can provide useful, scientifically based information. While tests may effectively diagnose certain mental illnesses, they do not directly measure the effects of such a diagnosis on parenting capacity. Furthermore, not all psychological tests can be truly objective, scientifically based tests. Although they can provide a standard procedure for evaluations, and thus ensure that relevant information comes to light, the tests do not measure parental fitness directly.¹²³ Furthermore,

psychological testing usually does not, nor is it designed to, provide data that are directly relevant to the immediate legal issue. Rather, testing can provide information relevant to the threshold issue of mental or emotional disturbance or personality functioning; the causal connection between this threshold and the functional, legally relevant behavior remains to be determined.¹²⁴

Thus, psychological test results should be accompanied by an explanation of what the results mean and how the results correlate with parenting capacity.¹²⁵

Some psychological tests might not even be admissible under the *Daubert* standard. Critics of one such test, the Rorschach inkblot test,¹²⁶ argue that its scoring "method is so flawed that the results are unreliable and probably invalid, thus making any expert testimony opinion derived from the TRACS¹²⁷ system inadmissible under

123. Kirk Heilbrun, *Child Custody Evaluation: Critically Assessing Mental Health Experts and Psychological Tests*, 29 FAM. L.Q. 63 (1995). Heilbrun suggests that adoption of the following guidelines would prevent inappropriate uses of psychological testing: (1) selecting only commercially available tests accompanied by a manual explaining "development, psychometric properties, and procedure for administration;" (2) ensuring that the test is reliable (reliability coefficient of .8 or greater); and (3) selecting a test relevant to a legal issue and having this relationship supported by "validation research published in peer-reviewed journals." *Id.* at 73-75. Furthermore, test administration must be standardized by the individual practitioner and the psychological community as a whole. *Id.* at 76.

124. *Id.* at 73. "There is no test for parental capacity. . . . Testing can provide information relevant to the threshold issue of mental or emotional disturbance or personality functioning. Usually, that data is not directly relevant to the legal issue." ABA CTR. ON CHILDREN AND THE LAW, A JUDGES GUIDE: MAKING CHILD-CENTERED DECISIONS IN CUSTODY CASES 89 (2001) [hereinafter ABA].

125. See ABA, *supra* note 124, at 89.

126. The Rorschach, another type of psychological test, consists of "10 bilaterally symmetrical inkblots placed on individual 5-by-9-inch cards." KEVIN R. MURPHY & CHARLES O. DAVISHOFER, *PSYCHOLOGICAL TESTING: PRINCIPLES AND APPLICATIONS* 87 (2001). During the test, the examiner asks the person to look at each card, convey everything seen, and return the card. *Id.* at 393. The examiner then classifies responses according to location, determinants, and content. *Id.* at 394.

127. TRACS is an acronym for "The Rorschach: A Comprehensive System."

Daubert.¹²⁸ There are many potential problems with using the Rorschach in custody determinations.¹²⁹ First, one person's response can be interpreted to indicate severe psychopathology.¹³⁰ This goes against a "well accepted maxim in psychology that a single piece of data should not be the basis for determining psychopathology."¹³¹ In general, the Rorschach tends to overstate psychopathology.¹³² Second, "[n]o studies correlate personality attributes identified by the Rorschach with good parenting."¹³³

One scholar, Jonathan Gould, contests the use of another test, the Minnesota Multiphasic Personality Inventory (MMPI),¹³⁴ in child custody determinations. Gould analyzed a specific case in order to explore problems with using MMPI results in child custody determinations. He suggested that both the trial court and appellate court worked on flawed assumptions when discussing MMPI results.¹³⁵ He argued that

the court operated under the assumption that the MMPI data provided some useful information about parenting capacity or competencies. Thus, the appeals court rendered a decision about termination of parental rights, basing its finding, in part, on the evidence entered into the record by the psychologist about the MMPI results.¹³⁶

Another scholar, Daniel W. Shuman, sharply criticizes the current use of MMPI results.¹³⁷ He states that

[g]iven the frequency with which the MMPI is administered in custody litigation, the fervor that often characterizes custody litigation,

128. Steven K. Erickson, *Psychological Testimony on Trial: Questions Arise About the Validity of Popular Testing Methods*, N.Y. STATE B.J., July-Aug. 2003, at 19, 21-22.

129. See generally *id.*

130. *Id.* at 22.

131. *Id.*

132. *Id.* Erickson argues that "[s]everal studies have revealed that American adults with no history of mental illness and living in the community, score in the maladjusted range when given the Rorschach, including high scores on scales indicative of severe mental illness such as the Schizophrenia Index." *Id.* at 23.

133. Daniel W. Shuman, *The Role of Mental Health Experts in Custody Decisions: Science, Psychological Tests and Clinical Judgment*, 36 FAM. L.Q. 135, 148 (2002). Shuman argues that "[t]he Rorschach can provide a good understanding of the adult's affect, organization skills, and reality testing, but, except for the most dysfunctional parent, it will not do much to answer questions about day-to-day parenting." *Id.* See also STAHL, *supra* note 102, at 55.

134. The MMPI consists of 550 affirmative statements that a person must answer either true, false, or "cannot say." MURPHY & DAVISHOFER, *supra* note 126, at 87. The MMPI-2, the redesigned version of the test, now contains 567 statements. *Id.* See also Shuman, *supra* note 133, at 144. This test evaluates a person on ten clinical scales. *Id.*

135. JONATHAN W. GOULD, CONDUCTING SCIENTIFICALLY CRAFTED CHILD CUSTODY EVALUATIONS 201 (1998).

136. *Id.*

137. Shuman, *supra* note 133, at 146.

and the United States and state supreme court decisions that provide litigants a tool to challenge the admissibility of expert evidence, the paucity of reported decisions addressing whether, when, or how the MMPI may be used in custody evaluations is shocking.¹³⁸

Despite these problems, MMPI results are contained in almost every child abuse and neglect file.¹³⁹

C. *Current Status: Judicial Deference to Mental Health Professionals*

Much recent literature criticizes the deference given to mental health professionals in the realm of child custody cases, specifically in divorce cases. Shuman has suggested that "[s]ubtly, without fanfare or hoopla, the role of mental health professionals in custody litigation is being transformed from expert as expert to expert as judge."¹⁴⁰ Shuman argues that transformation is inappropriate because the increased weight given to mental health expert testimony is based on flawed notions about its reliability and on antiquated notions developed by Sigmund Freud and his supporters.¹⁴¹ Shuman advocates for increased pre-admission scrutiny: "If society wishes to use mental health practitioners as experts in child custody cases, then law and science demand rigorous threshold scrutiny of their methods and procedures so that courts are informed consumers of this evidence."¹⁴²

D. *Case Studies*

This section examines four Illinois child abuse and neglect cases that illustrate one or more problems with overreliance on psychological testimony. These problems include the following: Psychiatrists overestimating their predictive abilities, overreliance on a single psychological test, and unwillingness to question the foundation for experts' opinions.

1. *In re B.D. v. J.T.: Differing Diagnoses Treated the Same*

*In re B.D. v. J.T.*¹⁴³ involved a mother's appeal from a trial court's order finding her unable to care for her children Brianna and Brian.¹⁴⁴ The order made the children wards of the court and appointed them a

138. *Id.*

139. This was the author's own personal observation as an intern with the Illinois Cook County Office of the Public Guardian during the summer of 2003.

140. Shuman, *supra* note 133, at 160.

141. *Id.* at 157-60.

142. *Id.* at 162.

143. 746 N.E.2d 822 (Ill. App. Ct. 2001).

144. *Id.* at 823.

DCFS guardian.¹⁴⁵ The case first came to court when Brianna was brought to the hospital for a stomach injury.¹⁴⁶ The hospital investigated and the child claimed that the mother's husband had kicked her in the stomach.¹⁴⁷

Dr. Michael Fernando performed a full psychiatric evaluation of the mother at the request of the mother's caseworker who was concerned about the mother's depressive symptoms.¹⁴⁸ After one meeting, Dr. Fernando provided a tentative diagnosis: "[B]ipolar II disorder, cyclothymic disorder and major depressive disorder recurrent with psychosis."¹⁴⁹ The doctor prescribed mood-stabilizing medication.¹⁵⁰ The mother did not take the prescribed medication, and at another meeting one month later, the doctor made a final diagnosis of bipolar II disorder and again recommended medication.¹⁵¹

A clinical psychologist, Sidney St. Leger, performed a psychological evaluation of the mother.¹⁵² The purpose of the psychological evaluation was to assess her ability to function effectively as a parent.¹⁵³ St. Leger diagnosed her with "borderline personality disorder"¹⁵⁴ and recommended therapy and parenting classes.¹⁵⁵ He recommended supervised contact between the mother and her children until these services were completed.¹⁵⁶

The child welfare agency supervisor, Marla Lawrence, also testified to the mother's compliance with therapy and other services recommended by the agency.¹⁵⁷ The supervisor further stated that the mother had "visited the minors and made progress in therapy."¹⁵⁸ The supervisor testified that "she felt the tension between Dr. Fernando and [the mother] had colored Dr. Fernando's evaluation of [the mother] and considered sending [the mother] to another doctor for a

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 824.

149. *In re B.D.*, 746 N.E.2d at 824.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *In re B.D.*, 746 N.E.2d at 824.

156. *Id.*

157. *Id.*

158. *Id.*

second opinion."¹⁵⁹ She never sent the mother to a different doctor, but did recommend that the children be returned home.¹⁶⁰

The trial court made the children wards of the court and expressed its displeasure with the agency's recommendation that the children return home.¹⁶¹ It found the testimony of Dr. Fernando "very credible."¹⁶² Furthermore, the court noted that "[the mother] never presented any medical evidence to contradict his medical opinion."¹⁶³ The court cited to *Ashley K* and reaffirmed that expert medical testimony cannot be contradicted by other types of testimony such as that proffered by the agency worker.¹⁶⁴

On appeal, the mother challenged the lower court's reliance on Dr. Fernando's testimony.¹⁶⁵ The mother claimed that Dr. Fernando "was not a parenting expert, he did not contradict Lawrence's testimony of [the mother's] fitness and St. Leger diagnosed [the mother] as having a different disorder not requiring medication."¹⁶⁶ The appellate court quickly disposed of these claims. First, it noted that Dr. Fernando evaluated the mother in his capacity as a psychiatrist, not as a parenting expert. Second, the court pointed out that Lawrence had insufficient knowledge to contradict Dr. Fernando's medical opinion.

Third, as to the differing diagnoses, the court stated, "But while his diagnosis may have been different, it was not contradictory."¹⁶⁷ However, this ignores the substantial difference between bipolar II disorder and borderline personality disorder.¹⁶⁸ The differences between

159. *Id.*

160. *Id.* Lawrence had been assigned to the case only a few weeks and had never seen the mother together with the children, nor did she know where the mother was living. *In re B.D.*, 746 N.E.2d at 824.

161. *Id.* at 825.

162. *Id.*

163. *Id.*

164. *Id.* at 826.

165. *Id.*

166. *In re B.D.*, 746 N.E.2d at 826.

167. *Id.* at 827.

168. The Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) presents the following diagnostic criteria for borderline personality disorder:

A pervasive pattern of instability of interpersonal relationships, self-image, and affects, and marked impulsivity beginning by early adulthood and present in a variety of contexts, as indicated by five (or more) of the following: (1) frantic efforts to avoid real or imagined abandonment . . . (2) a pattern of unstable and intense interpersonal relationships . . . (3) identity disturbance . . . (4) impulsivity in at least two areas that are potentially self-damaging . . . (5) recurrent suicidal behavior, gestures, or threats, or self-mutilating behavior (6) affective instability due to a marked reactivity of mood . . . (7) chronic feelings of emptiness (8) inappropriate, intense anger or difficulty controlling anger . . . (9) transient, stress-related paranoid ideation or severe dissociative symptoms.

the two disorders should have been examined before making a determination regarding the child's best interests.

Fourth, the diagnoses should not have been offered at all without an explanation of both their definitions and a discussion of how the diagnoses relate to parenting capacity. In *Conducting Child Custody Evaluations: A Comprehensive Guide*, scholar Philip Michael Stahl discusses how to perform and write an effective evaluation.¹⁶⁹ He suggests that technical diagnoses should be used minimally and that such reports should instead emphasize descriptive language.¹⁷⁰ For example, a judge should be told that "the father is volatile, externalizes blame, denies any wrongdoing on his part . . . rather than just be told that the father has a Borderline Personality Disorder."¹⁷¹

Despite the caseworker mentioning the negative relationship between Dr. Fernando and the mother, the appellate court never discussed the issue.¹⁷² The therapeutic or clinical relationship between the parties did not appear to be part of Dr. Fernando's report or testimony.¹⁷³ Scholars James Bow and Francella Quinnell express concern about such a lack of "clinical description of the parties."¹⁷⁴ Such a description is critical because information about a parent's presentation and the nature of the interactions with the evaluator are crucial to

AM. PSYCHIATRIC ASSOC., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 654 (4th ed. 1994) [hereinafter DSM-IV]. In contrast, bipolar II disorder has the following main diagnostic criteria: (1) the "[p]resence (or history) of one or more major Depressive Episodes;" and (2) the "[p]resence (or history) of at least one Hypomanic Episode." *Id.* at 362. A Hypomanic Episode is "[a] distinct period of persistently elevated, expansive, or irritable mood, lasting throughout at least 4 days, that is clearly different from the usual nondepressed mood." *Id.* at 338.

169. See generally STAHL, *supra* note 102. For a discussion of the need for a standardized protocol in child custody evaluations by mental health experts, see Stephen P. Herman, *Child Custody Evaluations and the Need for Standards of Care and Peer Review*, 1 J. CENTER FOR CHILD. & CTS. 139 (1999).

170. STAHL, *supra* note 102, at 85.

171. *Id.* See also NAT'L INTERDISCIPLINARY COLLOQUIUM ON CHILD CUSTODY, LEGAL AND MENTAL HEALTH PERSPECTIVES ON CHILD CUSTODY LAW: A DESKBOOK FOR JUDGES 321 (1998) [hereinafter NAT'L COLLOQUIUM] (suggesting that evaluators refrain from using DSM-IV diagnoses without a discussion about the impact such a diagnosis would have on a person's parenting abilities).

172. See generally *id.*

173. See generally *id.*

174. James N. Bow & Francella A. Quinnell, *A Critical Review of Child Custody Evaluation Reports*, 40 FAM. CT. REV. 164, 172 (2002). Bow and Quinnell examined fifty-two child custody reports (seemingly from the divorce context). *Id.* at 166. Of these, fifty percent did not contain a "clinical description of the parties." *Id.* at 172. They also found that fifteen percent did not interview "collateral contacts" (i.e., person's therapist, friends, coworkers) despite the importance of this in the "hypothesis testing process." *Id.* They also found that two evaluators had previously "served in a therapeutic role with the families they evaluated, a situation that is contrary to forensic guidelines regarding multiple relationships." *Id.* at 171.

developing and testing theories.¹⁷⁵ This is especially important in custody evaluations because these situations are so emotionally charged.¹⁷⁶ The stress involved with such a process often causes parties to appear at their worst.¹⁷⁷ Consequently, this information must be included in any complete evaluation report.¹⁷⁸

2. *In re I.D.: Generalizations About the Relationship of IQ to Parenting*

In *In re I.D.*,¹⁷⁹ the appellate court upheld the termination of the mother's parental rights¹⁸⁰ despite her compliance with recommended services.¹⁸¹ A clinical psychologist, Dr. Ronald Matthew, assessed the mother's intelligence quotient (IQ)¹⁸² at fifty-three¹⁸³ and recommended against returning the child home despite the strong bond that existed between mother and child.¹⁸⁴ Dr. Matthew seemingly based his conclusions on what an IQ of fifty-three generally means for an

175. *Id.* at 172.

176. Bow & Quinnell, *supra* note 174.

177. *Id.*

178. *Id.*

179. 563 N.E.2d 1200 (Ill. App. Ct. 1991), *overruled on other grounds by In re R.C.*, 745 N.E.2d 1233 (Ill. 2001).

180. *Id.* at 1202. The termination petition "alleged that she is unfit in that she is unable to discharge her parental responsibilities due to a mental impairment, and that there is sufficient justification to believe that such inability to discharge parental responsibilities shall extend beyond a reasonable time. (Ill.Rev.Stat.1989, ch. 40, par. 1501(D)(p).)" *Id.*

181. *Id.* at 1200, 1208. I.D. had originally been removed from the home when she was two years old. *Id.* at 1202. Evidence showed that the father had sexually abused two older females while I.D. was living there, and because of the mother's mental deficiencies, she was unable to protect I.D. *Id.* Accordingly, the court found I.D. was abused in that her living environment was injurious to her welfare. *In re I.D.*, 563 N.E.2d at 1202.

182. The DSM-IV states that IQ is a measure of general intellectual functioning measured by a standardized intelligence test. See DSM-IV, *supra* note 168. Furthermore,

[s]ignificantly subaverage intellectual functioning is defined as an IQ of about 70 or below It should be noted that there is a measurement error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument The choice of testing instruments and interpretation of results should take into account factors that may limit test performance (e.g., the individual's sociocultural background, native language, and associated communicative, motor, and sensory handicaps).

Id. at 39-40.

183. Fifty-three falls between the mild/moderate mental retardation division. *Id.* at 40. But the DSM-IV states that in order to diagnose mental retardation, the IQ result must be coupled with

[c]oncurrent deficits or impairments in present adaptive functioning (i.e., the person's effectiveness in meeting the standards expected for his or her age by his or her cultural group) in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.

Id. at 46.

184. *In re I.D.*, 563 N.E.2d at 1202.

individual's mental capacity instead of evaluating the facts of the case. His actions conflicted with APA guideline thirteen: "Psychologists interpret any data from interviews or tests cautiously and conservatively, strive to be knowledgeable about cultural norms and present findings in a form understandable to the recipient."¹⁸⁵ Even under the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV), a diagnosis of mental retardation cannot be made solely on the results of an IQ test.¹⁸⁶ Pure IQ results may or may not correlate with parenting ability, and the court should have examined this issue more closely before permanently severing the parent-child relationship.

In addition to testifying that he worried about how the mother would handle emergency situations, Dr. Matthew's report stated that "research shows children growing up in those homes where poor maternal care and lack of stimulation existed could show an IQ decrease of up to 30 points."¹⁸⁷ Dr. Matthew said that although the mother had made great improvements in specific areas of functioning, she still functioned at the level of a thirteen-year-old.¹⁸⁸ The opinion mentioned that I.D. suffered from developmental delays and that these delays decreased while she was in foster care.¹⁸⁹ While this may have been true, there was no evidence presented to show that social services could not have helped the mother to provide appropriate stimulating activities.¹⁹⁰ Regarding intellectual stimulation, scholar Robert Hayman, Jr. concedes that a mentally retarded parent may be less able to initially provide this stimulation.¹⁹¹ But Hayman suggests that intervention should be able to improve this and cautions against equating a nonoptimal intellectual environment with an entirely deficient environment.¹⁹² Mentally retarded persons may compensate for this in other areas.¹⁹³

Because I.D. was young, Dr. Matthew thought that the child would be able to deal with the separation if she were placed into a permanent home.¹⁹⁴ DCFS, in contrast, recommended that the court should

185. APA, *supra* note 92, at Guideline 13. See also sources cited *supra* notes 92-102 and accompanying text.

186. See *supra* note 183.

187. *In re I.D.*, 563 N.E.2d at 1206.

188. *Id.* at 1207.

189. *Id.* at 1206.

190. See generally *id.*

191. *In re I.D.*, 563 N.E.2d at 1222.

192. Robert L. Hayman, Jr., *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent*, 103 HARV. L. REV. 1201, 1222 (1990).

193. See generally *id.*

194. *In re I.D.*, 563 N.E.2d at 1207.

not terminate the mother's parental rights.¹⁹⁵ The appellate court had a limited opportunity to review the lower court's findings and stated that "great deference is given to the findings of the trial court since the judge had the opportunity to view the witnesses and evaluate the testimony."¹⁹⁶ Also, the appellate court made no mention of parent-child observations. Dr. Matthew may not have even observed the mother with her daughter I.D. Dr. Matthew testified, "In regard to being a parent, it was his opinion that she would be quite limited, and would be subject to poor judgment and deficiencies in being able to communicate."¹⁹⁷ His testimony did not make clear whether his opinion was based on actual observation or speculation based on his assessment of her IQ.

3. *In re J.J. and T.R.: Critical Omission of Parent-Child Observation*

In the case of *In re J.J. and T.R.*,¹⁹⁸ the mother appealed the court's order granting permanent, private guardianship for her children.¹⁹⁹ The children were first placed in temporary custody with DCFS in 1997 because one of the children, T.R., took several antidepressant pills and lapsed into a coma.²⁰⁰ The mother gave T.R. castor oil, put her to sleep, and only called an ambulance three hours later when the child had difficulty breathing.²⁰¹ The court granted custody to DCFS and placed the child with relatives.²⁰²

A psychological examination conducted in 1997 assessed the mother's IQ²⁰³ at sixty-seven²⁰⁴ and recommended against awarding the mother primary care of her children because of her various mental deficiencies.²⁰⁵ The examination stated that

195. *Id.*

196. *Id.* at 1205 (citing *In re R.M.B.*, 496 N.E.2d 1248, 1251 (Ill. App. Ct. 1986)).

197. *Id.* at 1202.

198. 761 N.E.2d 1249 (Ill. App. Ct. 2001).

199. *Id.* at 1251.

200. *Id.*

201. *Id.* At the temporary custody hearing, the parties stipulated that in 1993 another child, J.R., had been permanently injured when he shot himself with a gun that was on the floor. *Id.* In 1991, another child of the mother died at the hands of her biological father. *Id.*

202. *In re J.J.*, 761 N.E.2d at 1251.

203. See *supra* note 182 and accompanying text.

204. Sixty-seven falls at the high end of mild mental retardation if it is accompanied by the requisite characteristics. See *supra* note 183. The DSM-IV states that individuals classified as mildly mentally retarded "usually achieve social and vocational skills adequate for minimum self-support, but may need supervision, guidance, and assistance, especially when under unusual social or economic stress." *Id.* at 41.

205. *In re J.J.*, 761 N.E.2d at 1251.

[L.W.] should not be assuming primary care of her children, as she does not have the intellectual or personality resources to be an effective caretaker. It is advised that another close family member, relative or friend assume this job. By placing [L.W.] in a position of responsibility and/or authority, the children's safety and well-being remain at risk.²⁰⁶

By 1999, the case goal had been changed from "return home"²⁰⁷ to "private guardianship"²⁰⁸ with the aunt and uncle.²⁰⁹

The mother's former therapist, Edward Landreth, testified at her hearing. On direct examination, he testified that "he had terminated therapy because she 'could not grasp the concept of psychotherapy.'"²¹⁰ He also testified that the mother suffered from dysthymic disorder.²¹¹ He recommended against returning the children home.²¹² On cross-examination, Landreth revealed the following information:²¹³

[H]e made his recommendations regarding placement of the children without observing respondent interact with them. In fact, he never observed her interact with anyone. Landreth testified that dysthymic disorder is generally treated with individual psychotherapy and although there could be medical intervention, such intervention was more common with other types of depression. He was unaware of whether a psychiatric evaluation was ever prepared regarding respondent and admitted that such an evaluation might have shown that she was eligible for medical treatment. Landreth

206. *Id.* at 1251 (quoting the report of L.W.'s psychological evaluation).

207. 705 ILL. COMP. STAT. 405/2-28(2)(a) (2001).

208. *Id.* § 2-28(2)(e).

209. *In re J.J.*, 761 N.E.2d at 1252.

210. *Id.*

211. *Id.* at 1253. The DSM-IV presents the following diagnostic criteria for dysthymic disorder:

A. Depressed mood for most of the day, for more days than not, as indicated either by subjective account or observations of others, for at least 2 years. . . . B. Presence, while depressed, of two (or more) of the following: (1) poor appetite or overeating (2) insomnia or hypersomnia (3) low energy or fatigue (4) low self-esteem (5) poor concentration or difficulty making decisions (6) feelings of hopelessness.

See DSM-IV, *supra* note 168, at 349. Also, the criteria state that the symptoms have never abated for more than two months at a time, and no major depressive episode has been present during the first two years. *Id.*

212. For a discussion of the child protection systems' improper reliance on labels rather than individualized determinations of parental abilities, see Chris Watkins, *Beyond Status: The Americans with Disabilities Act and the Parental Rights of People Labeled Developmentally Disabled or Mentally Retarded*, 83 CAL. L. REV. 1415 (1995). Watkins suggests that judges often do not realize the "nonobvious strengths" of a parent labeled mentally retarded. *Id.* at 1419. The author advocates applying the Americans with Disabilities Act to such situations in order to ensure fair treatment. See generally *id.*

213. *In re J.J.*, 761 N.E.2d at 1253.

admitted that he did not establish a therapeutic relationship²¹⁴ with respondent and that she might have progressed better if she had been referred to a different therapist.²¹⁵

Thus, Landreth's testimony contained several questionable elements.

First, he never observed the mother with the children. Scholars Bow and Quinnell suggest that "child custody guidelines [] stress the importance of evaluating the interaction between child and parent. To neglect such a procedure in a child custody evaluation would seem indefensible."²¹⁶ Parent-child observations can reveal positive parenting behaviors, such as "parental teaching, positive reinforcement, and reasonable reciprocity in interactions with children, as well as the use of age-appropriate language."²¹⁷ Such positive parenting behaviors are best discovered through direct observation.

Second, Landreth's use of a technical diagnosis without explanation misled the court. Dysthymic disorder is a persistent low-level of depression that never rises to the level of a major depressive episode.²¹⁸ Since dysthymic disorder can be treated with medication, Landreth was remiss in not sending the mother to a psychiatrist for a medical evaluation.²¹⁹ His use of the technical diagnosis without an accompanying explanation did not effectively assist the trier of fact.²²⁰

Third, Landreth admitted that he never established a therapeutic relationship with the mother.²²¹ The mother testified that during sessions, "[Landreth] told her that he could not help her, that she needed an attorney, and that DCFS wanted to take her children."²²² After Landreth terminated therapy, the mother sought counseling with her pastor and attended counseling once a week for seven months.²²³ Since Landreth admitted the shortcomings in his working relationship

214. The therapeutic relationship can be described in different ways, but one way of looking at it is the human relationship between therapist and client: "[T]he therapist is still presumably an expert; but, if he or she is not first of all a human being, the expertness will not only be irrelevant, but even harmful. . . . [I]f the patient is viewed as an object, the patient will tend to become an object." 2 *ENCYCLOPEDIA OF PSYCHOTHERAPY* 790 (Michael Hersen & William Sledge eds., 2002).

215. *In re J.J.*, 761 N.E.2d at 1253-54.

216. Bow & Quinnell, *supra* note 174, at 174; *see also* NAT'L COLLOQUIUM, *supra* note 171. Chapter 25, Evaluating Custody Evaluations, suggests that failure to interview all involved parties and to observe parents with the children should alarm the judge and merit further inquiry. *Id.*

217. Daniel J. Hynan, *Parent-Child Observations in Custody Evaluations*, 41 *FAM. CT. REV.* 214, 218 (2003).

218. *See supra* note 211.

219. *In re J.J.*, 761 N.E.2d at 1254.

220. *See supra* note 171 and accompanying text.

221. *See supra* note 214.

222. *In re J.J.*, 761 N.E.2d at 1254.

223. *Id.*

with the mother, he should have referred her to another therapist instead of testifying that she did not grasp the concept of therapy.²²⁴

Despite these problems, the court placed great weight on Landreth's testimony. The court also seemed to place great weight on Landreth's credentials; Landreth had masters' degrees in both clinical social work and clinical psychology and was finishing his doctorate degree in psychology.²²⁵ Mere academic credentials, however, do not ensure reliable methodology.²²⁶ The lower court should have carefully scrutinized Landreth's methodology before allowing him to testify that the children should not return home to their mother.

4. *In re J.L.: Psychological Theory of Parenting*

The court relied on an outdated and unsupported theory when it prevented a child from reuniting with his mother in the case of *In re J.L.*²²⁷ In this case, a mother appealed an order requiring long-term foster care for her son, J.L., because she wanted him to return home.²²⁸ In 1991, J.L. and his siblings were removed from their mother's home due to her drug and alcohol problems.²²⁹ After a failed placement with his maternal grandmother, J.L. was placed with his paternal grandmother in Wisconsin.²³⁰ During the next two years, the mother engaged in the following services: inpatient and outpatient treatment, Alcoholics Anonymous meetings, parenting classes, and counseling.²³¹ The court ordered some of these services and the mother initiated others.²³² Based on the success of the supervised visits, which progressed into unsupervised visits, the mother's caseworker eventually recommended moving towards the goal of returning the children home.²³³

A social worker, however, disagreed with the caseworker's recommendation. At the hearing, the court admitted into evidence a report written by Dr. Linn McIntyre, a doctorate-level clinical social worker.²³⁴ Dr. McIntyre's report stated that the foster grandmother was J.L.'s "psychological mother,"²³⁵ and further stated that "[t]o tear

224. See *supra* note 210 and accompanying text.

225. See generally *In re J.J.*, 761 N.E.2d 1249.

226. See *infra* note 242.

227. 721 N.E.2d 638 (Ill. App. Ct. 1999).

228. See generally *id.*

229. *Id.* at 640.

230. *Id.*

231. *Id.*

232. *Id.* at 650.

233. *In re J.L.*, 721 N.E.2d at 641.

234. *Id.*

235. *Id.* at 642.

J.L. from his grandmother would do him irreparable harm: [H]e would be forced to adjust externally, but the internal loss would affect him profoundly.”²³⁶

After the hearing, the court made several rulings.²³⁷ One ruling stated that “[i]t was not appropriate to return J.L. home because of the irreparable harm he would suffer.”²³⁸ The appellate court affirmed the trial court’s judgment and cited *In re C.B.*:²³⁹ “Although a trial court is not compelled to follow the recommendations of an expert in custody matters, qualified and competent medical testimony concerning the child for whom the custody decision is being made must not be disregarded when determining what is in that child’s best interest.”²⁴⁰

The appellate court did not question the basis for the expert’s opinion.²⁴¹ The court pointed out that the expert had a doctorate degree, but did not further analyze her experience in the field.²⁴² Furthermore, the court did not question the expert’s reliance on the psychological parent theory.²⁴³ The psychological parent theory developed through the work of Freud and other psychoanalysts.²⁴⁴ This theory, as scholars Daniel Krauss and Bruce Sales pointed out, states that the person “who provided for the child’s environmental stability, emotional needs, and affection needs was considered to be the psychological parent, deserving exclusive custody.”²⁴⁵ In this case, no mention was made about the reliability of this type of testimony.²⁴⁶ Since the expert did not take the stand, there was no cross-examination.²⁴⁷ One commentator suggests that the entire theory of the psychological par-

236. *Id.* The report also stated that “[a] psychological evaluation done in October 1994 indicated that respondent had a dysphoric or depressed mood that she often denied or repressed.” *Id.* at 641. The evaluation was performed four years ago and the record did not indicate whether respondent had progressed in this area through medication or therapy. *See generally id.*

237. *In re J.L.*, 721 N.E.2d at 642.

238. *Id.*

239. *See generally In re C.B.*, 618 N.E.2d 598.

240. *In re J.L.*, 721 N.E.2d at 642 (citing *In re C.B.*, 618 N.E.2d 598).

241. *See generally id.*

242. *Id.* at 641. One commentator suggests that a court “need not accept experience standing alone as sufficient to qualify the psychologist as an expert when the experience is commonplace.” Carolyn R. Wah, *The Changing Nature of Psychological Expert Testimony in Child Custody Cases*, 86 JUDICATURE 152, 155 (2002).

243. *See generally id.*

244. Daniel A. Krauss & Bruce D. Sales, *Legal Standards, Expertise and Experts in the Resolution of Contested Child Custody Cases*, 6 PSYCHOL. PUB. POL’Y & L. 843, 847 (2000).

245. *Id.*

246. *See generally In re J.L.*, 721 N.E.2d 638.

247. *Id.*

ent developed “[l]argely on the basis of empirically unsupported psychoanalytic theory.”²⁴⁸

Thus, despite the mother’s compliance with services, negative results on drug and alcohol tests, and the recommendations of her caseworker, the goal remained long-term foster care.²⁴⁹ The court relied on the testimony of one licensed social worker in determining that long-term placement with a relative who did not wish to adopt J.L. was better than returning the child home.²⁵⁰

This decision directly contradicts the *Stanley v. Illinois* principle that no interest is served by separating “children from the custody of fit parents.”²⁵¹ The mother’s drug tests had been negative for three years.²⁵² She lived on her own and had been consistently employed.²⁵³

5. Lessons Learned

The preceding analysis explored some ways in which court opinions discuss the weight to be given to psychological testimony. Perhaps the results of these cases would have been the same if the testimony was either not admitted into evidence or given less weight. However, the importance of the parent-child relationship requires that decisions interfering with that relationship be based on correct interpretation of the evidence presented.

IV. IMPACT: USING *DAUBERT*

This section discusses the advantages of using the *Daubert* test, now encompassed in the amended Rule 702,²⁵⁴ to determine the admissibility of mental health reports and testimony in Illinois child abuse and neglect cases. First, the use of *Daubert* would require judges to determine whether the proposed testimony is scientific. Second, conducting inquiries into the reliability of the methodology used would give judges a more in-depth basis of knowledge. Third, *Daubert* anal-

248. Krauss & Sales, *supra* note 244, at 847. See generally Theresa A. Nitti, Comment, *Stepping Back from the Psychological Parenting Theory: A Comment on In re J.C.*, 46 RUTGERS L. REV. 1003 (1994). Nitti discusses the foundation for this theory, its weaknesses, and how those weaknesses affected the New Jersey Supreme Court in *In re J.C.*, 608 A.2d 1312 (N.J. 1992).

249. *In re J.L.*, 721 N.E.2d at 864.

250. *Id.*

251. *Stanley*, 405 U.S. at 652; see *supra* notes 10–14 and accompanying text.

252. *In re J.L.*, 721 N.E.2d at 641.

253. *Id.* It is also interesting to note that the court chose to cite *In re C.B.*, when that case rejected very similar abstract theories and *reversed* a decision made in reliance on such principles. See *supra* notes 76–86 and accompanying text.

254. See *supra* note 40 and accompanying text.

ysis would facilitate decisionmaking in accordance with the Supreme Court's recognition of the importance of parent-child bonds.

A. Daubert's *First Inquiry: Is This Scientific?*

Daubert first requires a judge to ask whether an expert is going to testify to scientific knowledge.²⁵⁵ In cases involving mental health testimony, the answer is frequently no.²⁵⁶ The concept seems simple, yet without this first inquiry, judges might take for granted that the testimony is indeed scientific.²⁵⁷ Asking the question, "Is this scientific?" and answering "No," would most likely cause a judge to place significantly less weight on the testimony.²⁵⁸

As one scholar points out, mental health professionals who testify regarding observations made about the parent-child relationship are not testifying to scientific knowledge.²⁵⁹ As scholars Thomas Gionis and Anthony Zito, Jr. note, "There is no research to support the proposition that mental-health professional expert guided child-custody placements are better than those where children are placed without the benefit of an expert."²⁶⁰

Asking the question, "Is this scientific?" would also force judges to analyze whether the expertise of mental health professionals allows them to render better decisions than the judge's own.²⁶¹ Shuman questions the deference afforded to mental health professionals' testimony:

If less rigorous scrutiny of mental health professional's clinical inference about the best interests of the child turns on a belief that mental health professionals possess some special predictive abilities according to a nonstandardized metric, an abdication of careful judicial assessment of the scientific validity of the reasoning or methodology underlying their testimony is misplaced.²⁶²

If a judge realized that the proffered testimony is based more on opinion than sound scientific reasoning, the judge might be more inclined

255. See *supra* notes 34–46 and accompanying text. See generally H. Joseph Gitlin, *Mental-Health Professionals in Child-Custody Cases: Giving "Expert" Testimony Its Due*, 89 ILL. B.J. 350 (2001).

256. *Id.* "In cases where a mental-health professional is testifying to what witnesses observed about the relationship between the parent and child, usually the expert is not testifying as to scientific knowledge." *Id.* at 354.

257. *Id.* Gitlin suggests that appellate court opinions and other evidence demonstrate that this is the case. *Id.*

258. *Id.*

259. Gitlin, *supra* note 255, at 354.

260. Gionis & Zito, *supra* note 56, at 4.

261. See *supra* notes 115–122 and accompanying text.

262. See Shuman, *supra* note 106, at 567.

to afford more weight to testimony from others, such as caseworkers. The judge's final decision might then be based on a combination of his or her own opinion about the child's best interests and the testimony of others.

As Shuman points out, when expert testimony is based on values relating to personal biases, heuristics, or other improper decisionmaking mechanisms, judicial deference is not justified.²⁶³ Judicial deference is only justified when the testimony is based on research that is grounded in sound methodology and subjected to peer review.²⁶⁴ Gould suggests that mental health professionals may make judgments that are *less* accurate than those made by judges or laypeople because clinical experience tends to create greater biases and more unfavorable prognoses.²⁶⁵

Given these difficulties, mental health professionals should not be allowed to render opinions on the ultimate issues in the cases. Also, "[s]ome commentators have argued that psychologists and other [mental health professionals] have no expertise in assessing a child's best interest and, consequently, that it is unethical for psychologists to offer 'expert' opinions that have no real scientific basis."²⁶⁶ Perhaps "[mental health professionals] should still refrain from offering expert testimony advocating a particular custodial arrangement for a specific child."²⁶⁷ If they do advocate a particular arrangement, the judge should take great care not to substitute a clinician's opinion for the judge's own opinion.

B. *The Individual Daubert Factors*

If the testimony is scientific, the judge would then evaluate the admissibility of the proposed testimony according to the individual *Daubert* factors: (1) Whether methodology has or can be tested; (2)

263. *See id.* at 566.

264. *Id.* Gould explains the proper role of the evaluation process:

We are but sophisticated guides for the trier of fact through a confusing array of psychological technology, a technology never intended for use in custodial assessment. Through our learned and judicious use of psychological theories, methods, and data gathering, we determine our best guesses possible. Our tools are often not valid for custodial assessment. Our models are often rationally, not empirically, derived. And our opinions are more educated guesses than truth. We need to be careful in how we present our data and opinions to the court so as not to mislead.

GOULD, *supra* note 135, at 38.

265. *Id.*

266. Krauss & Sales, *supra* note 244, at 863 (referring to M. Lavin & B. Sales, *Moral Justifications for Limits on Expert Testimony*, in EXPERT WITNESSES IN CHILD ABUSE CASES: WHAT CAN AND SHOULD BE SAID IN COURT? (S. Seci & H. Hembrook eds., 1998)).

267. *Id.* at 874.

whether the theory or techniques has been subjected to peer review and publication; (3) the known or potential error rate; and (4) whether the theory or methodology has obtained general acceptance in the scientific community.²⁶⁸

Scholars William Grove and Christopher Barden discuss the way this might impact mental health testimony, using the Rorschach as an example.²⁶⁹ They argue that the Rorschach is able to be tested and indeed has been tested.²⁷⁰ They assert, however, that the Rorschach is *not* generally accepted, nor has its validity been subjected to adequate peer review.²⁷¹ Grove and Barden then go on to note that despite this, the Rorschach is infrequently challenged (only six challenges out of 7,934 cases using such testimony, and only one successful) and argue that this is problematic because the Rorschach does not withstand *Daubert* scrutiny.²⁷²

C. Judicial Responsibility to Apply *Daubert* Despite Its Difficulty

Despite criticisms that judges are ill-equipped to evaluate scientific methodology,²⁷³ using the *Daubert* factors would greatly improve the quality of judicial decisions in the child abuse and neglect context. In the *Daubert* decision, the Supreme Court realized that potential difficulty, but charged judges with the appropriate application.²⁷⁴ In a sense, the Supreme Court justices urged their lower-court counterparts to gain the necessary knowledge and implied that lack of knowledge about scientific principles provides no excuse for abdication.²⁷⁵

268. See *supra* notes 34–46 and accompanying text.

269. William M. Grove & R. Christopher Barden, *Protecting the Integrity of the Legal System: The Admissibility of Testimony from Mental Health Experts Under Daubert/Kumho Analysis*, 5 PSYCHOL. PUB. POL'Y & L. 224, 227 (1999).

270. *Id.*

271. *Id.*

272. *Id.* See also Erickson, *supra* note 128. Erickson suggests that Rorschach is not generally accepted, nor has it been peer reviewed, and also “that the Rorschach is not a reliable or valid measure of many mental illnesses and does not measure what it purports to measure.” *Id.* at 24.

273. See generally Montz, *supra* note 107. Montz discusses a Texas study relating to science education for judges. The study found that among surveyed judges, ninety-two percent had received some undergraduate education involving the scientific methodology, yet eighty-nine of these judges admitted that this education occurred more than forty years ago. *Id.* at 111. Fifty-eight percent of the Texas judges surveyed felt that law school inadequately prepared them to evaluate the scientific method. *Id.* Seventy percent “reported no continuing education or practical business experience in the use and analysis of the reliability of scientific methodology.” *Id.* at 111–12.

274. See *supra* notes 34–46 and accompanying text.

275. See generally *Daubert*, 509 U.S. 579.

D. Daubert Hearings: Benefits

Daubert hearings are necessary in judge-decided child abuse and neglect cases. Forcing judges to conduct more *Daubert/Kumho* hearings would have several important effects. First, judges would be required to raise questions that previously might have gone unasked. A judge might have once assumed that the Rorschach tests were both reliable and predictive. If, instead, judges are forced to question the foundation of the Rorschach, they might open their eyes to criticisms of the test.

Second, as judges conduct more of these hearings, their knowledge base would increase. In future cases, when they heard expert mental health testimony, they would be more aware of the strengths and weaknesses of such testimony. They would become more aware of the technical jargon and the evidentiary foundations for diagnoses and predictions. For example, in the case *In re J.L.*,²⁷⁶ the judges at both the trial and appellate levels would have been more familiar with the diagnoses of both bipolar II disorder and borderline personality disorder, and would have been aware that they were in fact different diagnoses. Consequently, the judges could have placed less emphasis on the testimony of the experts or precluded its admission entirely. Whether this would have mandated a different result is certainly questionable, but at least the courts' opinions would have been based on complete information.

Third, conducting these hearings would raise the bar for agencies that act as court-appointed evaluators.²⁷⁷ If judges were continually questioning and evaluating the quality of and foundation for the agency's work, agencies would be forced to demand higher education and performance standards from the experts. This would improve the accuracy of the process and its outcomes for everyone involved.

E. The Supreme Court Revisited

The Supreme Court's holdings with regard to the parent-child relationship arguably demand stricter standards for the admission of expert testimony in child abuse and neglect cases.²⁷⁸ The Supreme Court has even referred to parental rights termination proceedings as quasi-criminal.²⁷⁹ Because the Supreme Court has repeatedly reaffirmed the importance of the parent-child relationship, standards for

276. See *supra* notes 227–253 and accompanying text.

277. DCFS contracts with mental health professionals to conduct psychological evaluations.

278. See *supra* notes 11–26 and accompanying text.

279. See *supra* note 25.

the admission of expert testimony must reflect this importance. Allowing the admission of expert testimony that does not meet the *Daubert* test undermines the importance of the parent-child relationship. Furthermore, the testimony must be based on valid, tested, and peer reviewed methodologies before it can be used to interfere with this constitutionally protected relationship.

V. CONCLUSION

In recent years, the Supreme Court has placed an increasingly high value on the parent-child relationship. At the same time, the Court has placed increased scrutiny on the admissibility of scientific evidence. However, in Illinois, parents still face the threat of having their children removed from their custody and having their parental rights terminated without close scrutiny of the mental health testimony offered against them. Psychological tests are still admitted into evidence without discussions of their limitations and supporting methodologies. Clinicians in these proceedings still disregard guidelines set forth by their profession and overstep their authority by advocating against returning a child to a parent's custody.

Rule 702²⁸⁰ must be adopted by the Illinois courts to deal with issues of custody and the APA and AFCC guidelines must be followed. In other areas of the law, the *Frye* test or a variation of *Frye* might suffice, but this is simply not the case in child abuse and neglect proceedings. Interference with parental rights triggers constitutional scrutiny and demands *Daubert*-level scrutiny for mental health testimony. *Daubert* requires a judge to analyze the underlying methodology before admitting evidence proffered by mental health professionals. No parent should lose custody of a child without the supporting evidence being carefully scrutinized.

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280. FED. R. EVID. 702; see also note 40.

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